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SOME REMARKS
UPON
THE PRACTICE
OF
THE MASTERS' OFFICES;

WITH
Suggestions for amending it.

BY
MORTIMER MORTMAIN, A.M.



LONDON:
SPETTIGUE AND FARRANCE,
Late Booksellers and Publishers,
67, CHANCERY LANE.

1847.

**SPETTIGUE and FARRANCE, Printers,
67, Chancery Lane London.**

PREFACE.

THE matters treated of in these pages were written solely for the perusal of the eminent individual who is at the head of the profession. Their length made the Author unwilling to trespass, without permission, upon time which has so many and important claims upon it. To this cause alone is their publication to be attributed. The Public need not be informed that the freedom of style in which the remarks now appear, had no place in the original manuscript.

If others, more capable of doing justice to the subject, should be induced by this example to state their views of the reformatations needed in the Master's office, they will entitle themselves to the Author's thanks for their attempts to promote an object he has long desired to see accomplished.

JULY 3, 1847.

SOME REMARKS
UPON THE
PRACTICE OF THE MASTERS' OFFICES,
WITH
SUGGESTIONS FOR AMENDING IT.

TWENTY years' experience of the delays so commonly incidental to, as to be considered inseparable from, suits in the Masters' Office, and a settled conviction of the inability of that Establishment, as it is at present constituted, to effectuate the intention of the Court of Chancery in decreeing references of subordinate, but oftentimes highly important questions, with that promptitude which the exigencies of the suitors require, are offered to the professional reader of these Remarks as an apology for their publication, with an earnest assurance, that unless they find an approving echo in his own breast, they have been written in vain; because, in such case, either the causes assigned must be visionary, or the writer's expedients for redressing them are ineffectual. The aim of these pages being to trace to their source evils universally complained of, with a view to their correction, whoever expects to find them a vehicle for the gratification of personal spleen, will be disappointed. Whatever truth appeared to demand in the investigation of the subject has been faithfully proclaimed; but in no case has a shaft been aimed at the feelings of the individuals to whom allusion is necessarily made; and it is gratifying to enter upon

the consideration of this subject, with an admission, that whatever faults exist in the Masters' Office, they are less the faults of individuals than of a system, which, however aptly it might have answered the purposes designed in its origin, is not fast enough for the present stirring times. In the reign of our earlier Plantagenet kings, before the introduction of Uses (those fruitful sources of equity litigation), when the fee simple of England was in a few powerful hands, and the rental of the kingdom less than many private incomes in our own days, and when, too, its commercial wealth was not equal to the annual returns of a modern second-rate merchant, the Masters could not have had anything like their present occupation. Creditors' suits (now plentiful as blackberries) must have been very rare when land was incapable of being devised, and descended with a very limited amount of liability to the engagements of the last owner, from which it was oftentimes in the power of the heir to rid it by alienation; and as, on the passing of the Statute of Wills, land devised was not subject to the testator's obligations, as it was previously to the passing of the statute, so this alteration of the law did not contribute anything to the growth of a branch of law which is now exceedingly luxuriant. The practice of marshalling assets in favour of particular creditors and legatees, which now forms a large and very important portion of the Masters' business, attained no size or strength before the last year of George the Fourth's reign.

Dating the era of law reform from the delivery of Lord Brougham's celebrated speech in the House of Commons, in February, 1828, it would not be too much to affirm, that since the commencement of George the Fourth's reign, the Court of Chancery has been confirmed in or endowed with a jurisdiction over more persons and things than it ever before possessed. Lords of manors and

married ladies—widows and children—tenants in tail and in remainder—parsons and tithe payers—legatees and creditors—trustees and *cestuis que trusts*—vendors and purchasers—mortgagors and mortgagees—lessors and lessees—idiots of all denominations—crowd the levees of the Lord Chancellor, and prostrate themselves before his Vices, to have every possible variety of business settled for them—from the purchase of a principality to an application for funds to defray a little boy's school bill. An unavoidable consequence of this is, that the labours of the court have been greatly increased, and the life of a Master in Chancery formerly, must have been simplicity itself, in comparison with what it is now. What would a Master of the date of Queen Elizabeth have said to references involving the investigation of accounts of such magnitude as were exhibited in the causes of *Lopez v. De Tastet*, *Small v. Attwood*, and some others of the same calibre? and yet the working power of his office is probably now not more than it was at the period referred to, although it may be said to have at this day five purveyors of employment, where formerly there was but one; and when the time of that one was more occupied with the affairs of the church, state policy, war, patronage, and (in troublesome times) the preservation of his own head, than with the business of his court. At all events, each Master has but one effective clerk and a copyist now; he could scarcely have had less then. The character of the country has become altogether changed during the last three centuries. Inhabitants, Opinions, Laws, Customs, Dynasties, and Religion have passed away, and others been substituted in their stead; but the Masters' Office, secured in its existence by a *quasi* immortality peculiar to itself, has pursued the even tenor of its way, and survived

“The wreck of matter and the crush of Worlds.”

It is now what it ever has been, and probably the same could not be observed of any other thing that the sun shines upon.* If an exception to the fact could be allowed, it must be found in the salaries of the eleven Masters and their clerks, which are not equal to what they were before the act of 3 and 4 Wm. IV., but still they exceed 35,000*l.* a year. It is not, however, with the amount of remuneration, but whether it is earned, we have to do; and he who would settle the question in the affirmative, must be profoundly ignorant of the comfortable manner in which business is done in Southampton Buildings, or else he must estimate the relative values of labour and money very differently to the rest of the world. The effect of a reference of a partnership, or other account of magnitude of a commercial character, is virtually an order to stay further proceedings in the suit for an indefinite period. The fact is undeniable, and can only be accounted for by one or other of the following hypotheses:—either the Masters and their clerks have more work upon their hands than they can get through with ordinary diligence, or they do not devote so much time to the doing of it as in reason they ought.

The Judges are not unaware of the way in which accounts are boggled in the Masters' Office. So far back as the year 1830, the Vice Chancellor of England (when directing an account in a suit,† which few men, under the peculiar circumstances of that case, would have had the temerity to commence), observed from the bench, that he should probably never hear of it more. His Honour was a true Prophet; for the certain expense, and the anticipated loss of time and trouble in taking the

* The sun, happily for himself, will never see the Masters' Office, until he makes his round of the world by the north instead of the south passage, or can penetrate through the premises which surround that dullest of all dull piles.—*Printer's Devil*.

† *Sly v. Dyneley*, 1830.

accounts, deterred the plaintiff from prosecuting a decree granted at his own solicitation, and from which, therefore, it may be presumed he expected to derive something. In another case, before the present Master of the Rolls,* the plaintiff, who had been some seven or eight years clerk or commission agent to the defendant, had lent his employer 700*l.* (the proceeds of a legacy), upon a deposit of title deeds, and a note of hand. After some years the clerk commenced an action for his money, whereupon the employer filed a bill (making a case of trustee and *cestui que trust*), and alleging various omissions, overcharges, and false entries in the defendant's accounts, exceeding the sum intended to be secured by the deposit, and praying a reference of all his customers' accounts that the defendant had been in any way connected with, and which amounted to several hundred thousand pounds. The Master of the Rolls, humanely considering the certain consequence of referring such voluminous accounts, and, from the nature of the suit, possibly suspecting that the plaintiff's object was delay, intimated that he would himself undertake their investigation. When all hope of inducing his Lordship to forego his intention was abandoned, the bulky ledgers were opened, and with patience, the more praiseworthy from its being without precedent, he, during four days, noted down all the omissions, overcharges, and false entries that the plaintiff's counsel, with the assistance of his solicitor, was able to point out in the defendant's accounts; and in answer to the often expressed regret of counsel that he should trouble himself with such details, quietly observed, "he believed he could not be better engaged." At the close of the fifth day, his Lordship announced that the wrongful doings of the defendant, supposing them to be incapable of explanation, amounted to twelve pounds odd shillings,

* *Shepherd v. Morris*, 1841.

the largest individual error being below one pound. This announcement, followed by an offer from the plaintiff's counsel to abate twenty pounds, put an end to the case, and the poor man got his money. Had a reference of the accounts been decreed, the balance due to him might not have been ascertained by this time, but the object of the bill would have been gained; the poor man must have begged to compromise with his litigious debtor, and, failing in that, might have been consigned to a prison for his oppressor's costs.

Let us now consider whether the Masters and their clerks devote as much of their time to the dispatch of business as the public (never very exigent), with its servants, might require. With the assistance of an almanack we have ascertained, that there are three hundred and eleven working days in the year, but from these the Masters and their clerk's subtract ninety-seven, or one day in every three, for their own purposes.

Will the descendants of those Englishmen who in 1752 resisted a Parliamentary attempt to alter Time's dial, by setting forward the hands only eleven minutes, out of complaisance to our neighbours' clocks; and who in the teeth of an Act of Parliament continued to let and hire, receive and pay, to date their birth days, and calculate their deaths by the calendar of their fathers; will their descendants, we say, submit to such wholesale abstraction of weeks and years as this? No, indeed they will not, if we know any thing of their spirit. But, be that as it may, our duty is done; we have made them acquainted with their wrongs, and having fired the train we await the explosion with as much eagerness as ever we watched the destruction of a wasp's nest in our boyhood.

Although there may be some rare instances of men passing through the world without ever concocting a suit for themselves, or inheriting one with their ancestor's estate, or without the estate (for this some times happens),

yet as every man is liable, from some cause or other, or without any cause at all, to be made a party to a Chancery suit, so is he interested in shortening its duration,—more especially so, since a suitor's years are said to diminish in an inverse ratio to the growth of the suits.

For the information of the non-professional reader we will show him how the ninety-seven days, which he loses from the year, and, if certain theorists are right, from his own life too, are made up. The long vacation numbers (exclusive of Sundays) sixty-eight days; Christmas vacation, eleven; Easter, eight; Whitsuntide, nine; and the Queen's birth day, one. Total, ninety-seven days. The hours of business are from ten till four. They bear some proportion to the years, and are certainly not too long. It should be borne in mind that this inquiry into the length of vacations, and hours observed in the Masters' offices, results from long continued and unheeded complaints against that establishment.

It is notorious that in some of the offices, a warrant to proceed upon a reference cannot be had returnable under a week or ten days; if this be owing to the days being too short for the performance of a reasonable average amount of business, nothing can possibly be more easy than the remedy, which is so apparent that one is led to suspect them of shutting their eyes who profess not to see it; it has this additional recommendation—It will cost nothing. Let the offices be opened in the morning one hour earlier, or shut one hour later in the afternoon, and let the present immoderate vacations be restricted to such limits as men of business generally would be thankful to have in the year—say five weeks—and there is an infallible specific for the complaint.

By the simple alteration suggested, the public would have from the eleven offices (counting each office as an

individual) 7,513 additional working hours, or a total of 21,637 hours, being one-third more than the present amount of working hours in a year, which are only 14,124. Estimate the difference of time according to the present scale of remunerating the Masters and their clerks, and it will be found to give a money value to the public of 18,400%. per annum. But if the Masters and their clerks devote to their duties as many hours in the day, and as many days in the year as ought to be required from public servants (a proposition which, after the calculation of holidays just exhibited, they might despair of maintaining), then, indeed, to impose upon them additional hours of labour, would neither be just nor an effectual remedy for the delay complained of.

Hopeless as it would be to deny the undue length and number of holidays enjoyed in the Masters' office, they are not the only impediments to business, and to some extent, at least, it might be conceded, that the chief clerks have more work upon their hands than they can get through. Instances of their paying for assistance out of their own pocket could be mentioned, if it were proper. The junior clerks, who have for the most part, or altogether, been clerks to barristers (in fact every Master brings in his own), are not capable of giving assistance of the kind required by the seniors, if, as is generally believed to be the case, the matters which chiefly hang fire in the Masters' Office, are partnership, and other disputes of a commercial character, which now more than formerly occupy the time of the courts of equity. Where principles only can be determined, details must be left to the Master to work out. Such subjects are not particularly interesting in themselves; but the chief reason of their being delayed, arises from the time allowed for each attendance of the parties being restricted to one hour, which is not sufficient to make any sensible impression upon the work.

A long period, owing to the claims of other business, intervenes before another appointment can be obtained, when any excuse or default in attendance of the solicitors is sufficient to create another postponement; and these excuses and defaults are of too frequent occurrence, where one party, as is commonly the case, dreads the result. A solicitor who might have been, in the first instance, sincerely desirous of prosecuting the reference vigorously, wearied at length with repeated postponements, in justice to himself, abandons a business in which he can make no progress for any other that he can proceed with, and thus he becomes personally obnoxious to a charge of delaying the suit.

It will strike the reader that this account of the matter militates against the cause of delay which has been first suggested. Undoubtedly it does so, in a measure; but until "the secrets of the prison-house" are revealed, some doubt must throw its gloom over the question. The two suggestions are not inconsistent with each other, and may co-exist.

If the evil be of the character lastly noticed, the remedy is to increase the working power of the Masters' Office, by introducing a limited number of properly qualified clerks, who might devote themselves exclusively to the investigation of disputed accounts, grant audiences of reasonable duration, with short intervals between them, and it should be their concern to see that a reference, once entered upon, did not slumber until its completion. These clerks, instead of being attached to any particular office, might be common to all the Masters within the limits of their duty. Whenever one or both of the alterations we have suggested is effected, there will be no more complaints of delay against the Masters' Office, and that establishment will become, what it ought to be, a useful member of the Court of Chancery, and a

great benefit to the suitors. To the new clerks might also be left the consideration of creditors' claims upon estates of deceased parties, and in all references confided to them, they should prepare for the Master the draft of his report, as the chief clerk is now in the habit of doing. Any statement of the causes which occasion delay and increase the costs in the Masters' Office, would be culpably incomplete if it did not notice the mode of taking evidence there. If no objection is made by the opposite party, facts may be substantiated by affidavit; but in controverted cases, affidavits are commonly objected to, and then the witnesses are examined upon written interrogatories, either by the examiners in London, or by commissioners in the country,—a very genteel, but, at the same time, a very dilatory, expensive, and unsatisfactory mode of eliciting the facts;—to which this further objection also attaches, viz., that when evidence has been in this manner taken, six weeks must elapse before its contents are communicated, unless the parties mutually agree to its earlier publication. True it is that the Masters are, by the general orders of the court, invested with a discretion to examine witnesses before them, *vivâ voce*, if they see fit, but, unfortunately, they rarely do see fit; and it would be an important step, in the way of improvement upon the present practice, if it were made compulsory upon them to examine witnesses *vivâ voce* at the instance of the parties; and also if it were obligatory upon the Master or one of his clerks to take down the evidence, instead of subjecting the parties to the expense of a short-hand-writer to do what is properly the Master's work. A striking instance of the advantage of a *vivâ voce* examination occurred, some years since, in a cause before the late Master Martin, in 1836. A reference of all accounts between the plaintiff and one deceased had been decreed; and among

the sums claimed by the former was one of 500*l.*, in support of which he produced his check in the testator's favour, but no evidence of its payment was offered; the bank had failed several years before, and their books (it was said) lost in the passage between Liverpool and Dublin. The plaintiff's pass-book was also said to have been lost or destroyed. Under these circumstances, the item was disallowed; but after a considerable lapse of time an application was made for a review of the item, upon the ground of the plaintiff having recently discovered a person who would prove that the check was given by the plaintiff to the testator. With some difficulty the Master granted a *viva voce* examination; the witness appeared, and deposed to the fact mentioned, and that nobody else was present at the time but the plaintiff, the deceased, and himself. The Master thought the fact conclusively established, but the witness being subjected to rigorous cross-examination, stated ignorance of some circumstances, which he could not but have known if his evidence in chief was true; he prevaricated, and became involved in a labyrinth of inconsistencies, and was compelled to admit, that having heard of the dispute, and knowing something of both parties, he had volunteered to give evidence, in expectation of being remunerated for his "loss of time." We give the witness's expectation in his own obscure phraseology. The Master (who had had the advantage of seeing the manner in which the witness gave his evidence), declared that he could not believe him, and the present Lord Chancellor held that the Master was correct in that conclusion; but had he been examined upon interrogatories, the result would in all probability have been different. The cross examination would have been useless, as all cross-examinations must be, where it is not known what facts the witness has deposed to in his examination in chief, and 500*l.* would

have been lost to the testator's family. An observation, and but one, is necessary with respect to the class from which the additional clerks should be selected, if the suggestion of creating additional clerks is ever seriously entertained. Their duties will be of a mixed character, and having some relation to figures, it might be expected by some that accountants would be the fittest persons; but apart from any natural prejudice in favour of one's own profession, the preponderancy of qualification is on the side of lawyers, who, in a case of the greatest imaginable ignorance, could be metamorphosed into clever accountants at short notice; but the converse of the proposition, when accountants are given and lawyers required, does not hold good. Moreover, the knowledge of figures required, is trifling, and not to be mentioned in comparison with that familiar acquaintance with the rules of evidence, and of the practice which obtains in courts of law and equity, which are indispensably necessary to the due discharge of the duties that the new functionaries will have to perform.

The length to which these observations have extended, induces us to congratulate the reader, that few words will suffice to prove the second object; they were designed to show, viz., that the income of the suitors' fund might be increased 9000*l.* per annum, by the prevention of an act, which (with every respect for the clerks who commit, and for the Masters who sanction it) seems to be as gross a wrong, if we may be allowed to call things by their proper names, as ever was practised; and by reducing the Chancery folio to the length of the common law folio. To establish the first of these propositions, it should be observed, that, according to the return made to the House of Commons by the solicitor to the suitors' fund, for the years 1842-3, the sum accounted for by all the Masters'

Offices, for furnishing to the suitors copies of proceedings, was 12,000*l.*, the product of 1,152,000 folios, at twopence halfpenny; but, in fact, the sum received was 19,200*l.*, the public being charged fourpence per folio; out of which the junior clerks, under the colour afforded by the 40th section of the 3 and 4 Will. IV., c. 94—but which, we submit, is no warrant for their doing so—retain to their own use three halfpence per folio. Now, we have seen it stated in the public papers, and we believe there is no doubt whatever about the fact, that the junior clerks pay the persons who do the writing one halfpenny per folio at the most, whereby, upon 1,152,000 folios, the eleven clerks make a profit of 4800*l.* per annum. If their statutable salaries are not sufficient, they should be increased; but this mode of remunerating them, in itself objectionable, exhibits a disparity between service and salary which ought not be overlooked; but we refrain from more than a passing allusion to this subject. The other means by which the income of the fund might be fairly increased, is, as was observed *en passant*, by reducing the Chancery folio to the length of the common law folio—the former contains ninety words, the latter seventy-two. Why there should be such or any difference between them, is not easy of comprehension. The Equity Exchequer, when it was in existence, observed a medium between either extreme, and exhibited eighty words to the folio. The Chancery folio, however, is not always the same, for in bills of costs its length is but sixty words. If seventy-two words should become the imperial measure of a legal folio, it would (calculated upon the return quoted) give 288,000 additional folios, which, at threepence halfpenny per folio, would yield a further increase to the fund of 4200*l.*, making, with the before mentioned saving of 4800*l.*, a total gain of 9000*l.* per annum, accruing from copy money

alone; a sum, of which the half would be sufficient to afford the Masters' Office the additional assistance which it is thought by some to stand in need of, and to increase the salaries of the junior clerks to a proper amount.

If ever the public should be invited to propose specific alterations in the practice of the Masters' Office, as it is said to have been once invited to suggest improvements in the work of a vain artist, possibly as little of the practice as of the picture would be left untouched. We certainly would take the liberty of offering something, in the hope of conducing to a quicker dispatch of business, to economy of expenditure, and the augmentation of the suitors' fund, unless our ideas should be pre-exhibited by abler pens, to whom we would willingly leave the task.

Here, courteous Reader, the writer of these remarks—dropping the editorial *we*—shrinks again within his own natural and grammatical proportions; and if ever for a moment your nice ear has been offended by the jingle of an acrimonious expression savouring of personality, impute it to excess of zeal, or to any cause but malice prepense :

“ Let my disclaiming from a purpos'd evil
Free me so far in your most generous thoughts,
That I have shot my arrow o'er the house,
And hurt my brother,”

and be you appeased.

APPENDIX.

SUMMARY OF THE STATEMENTS ADVANCED IN THE PRECEDING PAGES.

1.—With reference to Time.

There are, under the present arrangement—	DAYS.
Working days in the year	311
(Fifty-two Sundays, Good Friday, and Christmas Day excluded.)	
Deduct—	
The Sovereign's birth-day	1
Easter Vacation, appointed by the Lord Chancellor. In 1847, it commenced on Good Friday, and terminated on the week following. Days, exclusive of Good Friday and Sundays	8
Whitsun Vacation, commencing on the third day after Easter Term, and termi- nating the second day before Trinity Term, rejecting Sundays	9
The Long Vacation, commencing 10th Au- gust, and terminating 28th October, re- jecting Sundays	68
Christmas Vacation, commencing 24th De- cember, and terminating 6th January, rejecting Christmas Day and Sundays	11
(holidays) —	97
	<hr/>
Days (net)	214
Working hours per diem	6
	<hr/>
	1284
Number of offices	11
Total number of working hours devoted	<hr/>
by the offices of the eleven Masters (hours)	<u>14,124</u>

According to the proposed alteration, there	DAYS.
would be working days in the year . . .	311
Deduct holidays—	
Whitsuntide, between Easter and Trinity	
Terms	4
Christmas, in addition to Christmas Day	2
The Long Vacation, commencing 28th August, and ending on the 30th September, rejecting Sundays	24
(holidays) —	30
	<hr/>
Days (net)	281
Working hours per diem	7
	<hr/>
	1967
Number of offices	11
	<hr/>
(Total hours)	<u>21,637</u>

Comparison.

Working hours proposed	21,637
Do. at present time	14,124
	<hr/>
Difference (Hours)	<u><u>7513</u></u>

2.—With reference to Money.

The amount that would have been paid into the suitor's fund, if the alterations proposed had been in force previous to the return for the years 1842-3 (Net)	£21,000
The sum actually paid in	12,000
Loss to the fund under the existing system	<hr/>
(per annum)	<u><u>£9000</u></u>



